

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

STARRY BROOK NATURAL MEDICINE

DECISION OF THE HEARING OFFICER

Appearances: John K. Bosen Esq., Attorney for the Employer

Nature of Dispute: RSA 275:43 I unpaid commissions
RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary
RSA 275:43 V unpaid employee expenses
RSA 275:43 V unpaid bonus

Employer: Starry Brook Natural Medicine, LLC, 14 Bow Street, Exeter, NH 03833

Date of Hearing: June 4, 2014

Case No. 47773

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on March 12, 2014. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on April 25, 2014.

At the start of the hearing, the claimant withdrew the requests for employee expenses and a bonus payment. The Wage Claim is now for \$3,733.70.

The claimant testified that at the start of her employment there was no wage agreement in place. There was an understanding that there would be set wages and commissions. The claimant said there was no agreement early in 2013. The employer presented several proposals which were not agreed to by the claimant. In October a proposal was brought forth by the claimant and this was not agreed to by the employer. The claimant worked for that year without a signed wage package.

In 2014 the claimant gave her notice and was kept on by the employer on a commission basis. For the days worked in January the claimant was paid \$515.00 in commissions. The claimant stated that she believed that this payment was to offset some of the wages due for 2013.

The employer testified that there was no signed contract designating the wages to be paid per pay period. The claimant did agree to a 50% split on commissions. This is what the claimant was paid on under the contract. The employer testified that there was never a second contract but there was a proposal of payment based on the number of patients seen by the claimant. The claimant would not accept this proposal as the number was higher than credited for past performance.

There is no dispute on pay for 2014. The claimant received a straight 50% of commissions received. This was paid and was never meant to be an offset for the prior year. The employer stated that the claimant never accepted any salary structure. The working relationship continued on commissions because there was no written and accepted salary proposal. The employer maintains that all wages have been paid for the year 2013 and for the time worked in the year 2014.

FINDINGS OF FACT

RSA 275:43 I. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing. Commissions are considered wages under this section.

RSA 275:43-b: Payment of Salaried Employees. –I. A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked; provided, however, a salaried employee may not be paid a full salary in each of the following instances:

- (a) Any pay period in which such employee performs no work.
- (b) When an employee receives a disciplinary suspension without pay in accordance with the Fair Labor Standards Act, as amended, for any portion of a pay period, and written notification is given to the employee, at least one pay period in advance, in

- accordance with a written progressive disciplinary policy, plan or practice and the suspension is in full day increments.
- (c) If an unpaid leave of absence for a salaried employee is allowed pursuant to a written bona fide plan, policy or practice for absences, of a full day or more, of an employee caused by bereavement leave.
 - (d) Any portion of a work day or pay period for leave taken under, and in accordance with, the federal Family and Medical Leave Act of 1993, as amended, if written notification from the employer stating the reason for such leave is given to the employee and placed in the employee's personnel file.
 - (e) If the salaried employee voluntarily, without coercion or pressure, requests time off without pay for any portion of a pay period, after the employee has exhausted any leave time pursuant to a written bona fide leave plan, practice or policy and such leave time requested by the employee is granted by the employer.

This part of the law deals with the salary issue and how and when it is implemented as a wage plan.

It is the finding of the Hearing Officer, based on the written submissions and the testimony provided for the hearing, that the Wage Claim is invalid. The claimant has the burden to show that there are wages due and owing and she did not meet this burden.

The Hearing Officer finds that the parties had a wage structure but never mutually agree to amend that structure to include a salary with commissions. The claimant worked for over a year within the established structure and did try to implement a salary structure that would be agreeable to both sides. This never happened.

Although the claimant testified that she was unable to agree to an agreement that included a set salary, she did work for over a year with the commission contract that she agreed to at the start. There was no testimony that the claimant did not receive minimum wage for her time worked.

The other factor to be brought into this decision is that New Hampshire is a "free will" state. An employer can let an employee go at any time and the employee can leave at any time. It appears that the wage structure was an ongoing process between the parties and that the structure in place paid for work done.

The Wage Claim is invalid.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds the claimant failed to prove by a preponderance of the evidence that she was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

/s/

Thomas F. Hardiman
Hearing Officer

Date of Decision: June 30, 2014

Original: Claimant
cc: Employer

TFH/clc